CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, AUGUST TERM, 1826.

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BAYON
vs.
TOWLES.

BAYON vs. *TOWLES.*

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court.

The vendee is estopped from asserting that the slave's habit of running away, was disclosed to him as a qualified vice, whilst the deed contains an averment that it was stated as an absolute vice.

The defendant resists the payment of a note he gave the plaintiff for the price of a slave, on the ground that the sale ought to be rescinded, because the slave was, at the time of the sale, in the knowledge of the Plaintiff, addicted to robbery and stealing, and in the habit of running away. There was judgment against the plaintiff: he appealed.

We cannot find on the record any proof of the slave being addicted to robbery or stealing; but it clearly appears he was in the ha-

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bit of running away, in the knowledge of the vendor.

The bill of sale was executed for the vendor, who resided at Donaldsonville, by an agent of his, in New-Orleans, and expressly states the slave to be sold as "a runaway "and drunkard." But the defendant shews that the plaintiff, in Donaldsonville, represented to him (with the view to induce the acceptance of a bill of sale, without a warranty of the disposition to run away) that the slave was only in the habit of absenting himself for a short period, and afterwards returning of his own accord, and never wandered to any great distance; while said slave during the time he was in the vendor's possession, ran away and wandered as far as the Choctaw nation of Indians, and did not return of his own accord, but was seized and brought back.

This case is endeavored to be assimilated to that of *Macarty* vs *Bignieret*, 1 *Martin*, 149—in which the superior court of the late Territory held that the vendor having failed to disclose the disposition of the slave to

run away, the clause of warranty, although formally excluded, was fraudulently so, and the vendor was liable.

In the present case, if it appeared that the disposition to run away was clearly misrepresented, the vendor should not recover; but it does not follow, from the circumstance of the representation at Donaldsonville, that the defendant was led into an error—for the bill of sale expressly states the slave to be sold as "a runaway," *i. e.* as one with the disposition to run away, which gives a right to the resolution of the sale—not as having the disposition to loiter around the housé of his owner for a whilé, and then return, which the vendor called *petit marronage*, "a small runaway."

All the oral representations, which preceded the contract, must be merged in the solemn and authentic declaration contained in the deed of sale, and while by that document, the vendee acknowledges that he was put on his guard by the positive declaration of the person he contracted with, that the slave sold was a runaway, in the sense of that expres-

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sion which excluded any recompense on that account, he cannot be permitted to say he acted under an impression received from anterior conversations with the vendor, directly in contradiction with the absolute and formal assertions on record—which must control every anterior and verbal one.

The vendor cannot be listened to, when he asserts that the habit of running away was disclosed to him as a qualified one, while he has acknowledged, under his hand, before a notary and two witnesses, that the vendor informed him of an absolute and unqualified running away.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and that the plaintiff recover the sum of fifteen hundred dollars, with interest at the rate of five per cent. per year, from the twenty-third of March, one thousand eight hundred and twenty-two, until paid; and that the slave, being mortgaged, be sold for this purpose. The defendant paying costs in both courts.

Simon & *Bowen* for the plaintiff. *Baker* & *Brownson* for the defendant.

MARC vs. *CHURCH OF ST. MARTINS.*

APPEAL from the court of the fifth district.

A church-warden is an admissible witness in behalf of the corporation of a church.

PORTER, J. delivered the opinion of the court.

This action was instituted by the heir of the late curate of the parish of St. Martin, to recover a sum of money alleged to be due to his deceased uncle, for moneys paid and advanced for the use of the church (*Fabrique*) during his life time. Annexed to the petition is an account liquidated by the church-wardens, and signed by them.

The principal defence set up in the answer, is error in the settlement. It is alledged that, according to the tariff established by the Bishop of Louisiana in the year 1795, the curates of the parishes in the diocese had a right to receive a certain sum on each interment made by them, a portion of

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which was set apart for the use of the church. That the late curate acted under that tariff, and received a large sum of money to the use of the church, which he failed to pay over, or to account for in the settlement made by them; and that they were ignorant of the particular provisions contained in the tariff until after the decease of the ancestor of the plaintiff.

There are two bills of exceptions on record taken by the plaintiff, which, as he succeeded in the court below, have not been much relied on in the argument. The decisions excepted to, appear to us correct, and we proceed to examine one on which the defendants have relied as a ground for sending the cause back for a new trial.

On the trial, they offered one of the defendants on record, who was church-warden, as a witness to prove that the set lement was made in error; and that the late curate had received many sums of money due to the congregation, which were not included in the account rendered. The witness was objected to, on the ground that he was a party to the

suit, and that the law had permitted him to make proof in no other way but by interrogatories on facts and articles.

The witness offered was a nominal, not a real defendant. The party contesting the demand was the parish of St. Martin, not those whom they had appointed to manage their affairs, and represent them in court. The judgment could not have affected the witness in a greater degree than any other member of the congregation. The reason, then, on which the rule was established fails, and with it the rule itself. The expressions used in the Code, " that there shall be no longer any other mode of making proof of a fact, by either *plaintiff* or *defendant*, but by what is called the " interrogatory on facts and articles," were most probably intended to exclude the decisory oath formerly known to our law. But admitting them to repel testimony in the shape it was presented here; still they leave the question open, nay, compel the court to go into the enquiry, whether the party offered as a witness, be really plaintiff or defendant.

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The interest of the church-warden in this case did not even extend to the costs, and the objection which would formerly have been open to him as a member of the corporation is removed by a special act of the legislature, 3 *Mart. Dig.* 482, *no.* 5.

We have held, in the case of *Curtis* vs. *Graham*, that a co-defendant, in an action of trespass, might be sworn as a witness. The reasons on which he was held competent, are certainly quite distinct from those which exist here. But the case shews that we did not consider the mere circumstance of the witness being a defendant on record, prevented him from giving evidence.

It has been contended that the case ought not to be remanded; because the proof offered could not have availed the defendant, as no legal obligation was shewn on the part of the curate, to receive and collect the monies for the use of the church. But the answer expressly alleges that he received moneys on account of the church; and the witness is stated in the bill of exceptions to have been offered to prove that he had so received

them. If this be true, we are not prepared to say, at this stage of the proceedings, that the evidence could not have been of any use to the defendant.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed: And it is further ordered, adjudged, and decreed, that the cause be remanded to the district court, with directions not to reject the witness mentioned in the bill of exceptions, because he is a defendant on record. And it is further ordered, adjudged, and decreed, that the appellee pay the costs of this appeal.

Simon & *Brwnson* for the plaintiff, *Bowen* for the defendants.

REELS vs. *KNIGHT.*

If in a suit for partition, the defendant sets up a title in himself which is alledged by the plaintiff to be simulated, the court of probates has no jurisdiction of the case.

APPEAL from the court of the fifth district. PORTER, J. delivered the opinion of the court. This action was commenced in the court of probates to obtain a partition of the estate of the mother of the plaintiff and defendant.

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The defendant set up title to himself in the premises, and the plaintiff alleged that the sale was simulated and fraudulent.

No plea was put in to the jurisdiction, the cause was tried on its merits, and judgment given for the defendant. The plaintiff appealed to the district court, where the case was submitted to a jury, who found a verdict in his favor, and from the judgment rendered thereon the defendant appealed.

And the want of jurisdiction being *ratione materiæ* is not cured by consent.

An appellate court cannot give a judgment which the court *a quo* could not.

The court of probates had no jurisdiction of a case like this. The question was title, of which the ordinary tribunals could alone take cognizance. This has been expressly decided in the following cases, and it is not necessary to repeat the reasoning on which they are founded. *Willi m* vs. *Spencer & al. Harris' Tutor* vs. *M'Kee & al.* & *Donaldson & al.* vs. *Dorsey & al. vol.* 4, 77, 487, 509.

The first case was precisely that before the court, and it too was an appeal to the district court. It was there contended that as the latter tribunal had original jurisdiction of the cause, it was well seized of it, in its appellate capacity. But we were of

opinion that this circumstance did not cure the defect, because the appellate court never can give a judgment, which the court *a qua* could not.

The objection being to the want of jurisdiction *ratione materiæ*, consent did not cure it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the petition be dismissed with costs.

Ogden & *Brownson* for the plaintiff, *Bowen* & *Baker* for the defendant.

RAWLE vs. *FENNESSEY.*

APPEAL from the court of the fifth district.

The counsel for the absent heirs needs not any specific authority to institute a suit, under the 1207th article of the *Civil Code.*

PORTER, J. delivered the opinion of the court. The 1207th article of the new code provides, "that if in the interval between the opening of the succession, and the appointment of the curator, there are any conservatory acts to be performed or suits to be instituted, the delay of which may injure the

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succession, the counsel for the absent heirs shall be authorised to perform such acts or institute such suits before any court, on proving his appointment by the certificate thereof under the seal of the court which has appointed him."

The construction given by the judge *a quo* to this article has produced the present appeal.

The plaintiff states himself attorney for the absent heirs of a succession, avers that a sum is due it by the defendant, and that further delay in collecting it might endanger the loss of the debt.

The defendant pleaded various exceptions; none of them require particular notice except the 4th and 7th, which state, that the suit should have been brought in the name of the curator of the vacant estate, and that the plaintiff had not prayed and obtained leave to institute and maintain this action as counsel for the absent heirs.

The judge *a quo* considered this objection as fatal, and dismissed the suit. In the opinion delivered, he has not stated the reasons for coming to this conclusion. We have considered the subject attentively and are un-

able to agree with him. The phraseology of the article is not clear and explicit, it is therefore the duty of the court to seek for the meaning of the legislature in the motives which we must suppose produced the enactment, and to give that construction which will best promote the remedy intended to be conferred.

The reasons which we must suppose influenced the legislature, were the necessity of the attorney for the absent heirs, or some other person, acting in cases where delay might occasion a loss to the succession. By compelling them to produce the proof and obtain an authorization for each particular suit, the conservatory objects contemplated by the remedy given, would in many instances be defeated. Nor would the defendant be in any respect that we can discover, protected or benefited, by requiring this formality to precede the suit; for if justice be his object, it is better he should meet the plaintiff at once in the principal suit, on the grounds on which he asserts a right to sue, than be obliged to contest an authority which has already been sanctioned by the court.

We understand the expressions "he shall

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be authorised to sue," equivalent to, he shall have the power to sue. The language used in the article is, *verbatim*, that used in the 31st section of the act in relation to insolvent debtors: and we are not aware that a special authorisation has been held necessary for the syndics to release the mortgages existing on the property of the ceding debtor. *Acts of* 1817, *sect.* 31.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the case be remanded to be proceeded in according to law, and that the appellee pay the costs of the appeal.

I. L. Baker & *J. Baker* for the plaintiff, *Markham* & *Fennessey in propria persona* for the defendant.

PERRY vs. *GERBEAU & WIFE.*

The attorney in fact to whom the plaintiff had endorsed a note for collection, may

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The defendants in the original an-

swer, pleaded the general issue, and afterwards, with leave of the court, a plea by which they averred "that a partnership for the purchase of cotton existed between one of them and the plaintiff, in the years 1818 and 1819: that they were to share the profits and losses equally, and that a loss was sustained in purchasing and selling this cotton, to the amount of $2400, one half of which sum should be taken as an offset against the claim set up in the petition.

The first question necessary to be decided arises out of an endorsement made on the note by the petitioner previous to the institution of the suit, and existing on it at the time of the trial.

On offering it in evidence the defendants objected that as the petitioner, who was payee, had endorsed it over to his attorney in the present case, it could not be received in evidence, the legal title being vested in another.

The counsel for the plaintiff then applied to the court for leave to strike out the endorsement, which leave was granted. The defendants excepted to the decision.

In the bill of exceptions it is stated by the judge, that he granted the permission prayed

be permitted to strike out the endorsement, at the trial.

Evidence of the admissions of the party is of the most dangerous kind.

A wife is not bound by a note executed jointly and severally with her husband, on a contract which did not turn to her advantage.

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for, because the plaintiff's attorney was the endorsee.

It is certainly a well established principle of law, that actions can only be maintained on notes or obligations by those in whom the legal title is vested. This has been admitted in argument: and it has also been conceded that the apparent legal title was not in the plaintiff at the time the suit was instituted, but it was urged that in point of fact the real interest in the note always was in the payee; and that proof of these facts could be, and was given, at the time of the trial.

If it followed that, in all cases, the legal interest in a note was vested in the person to whom it was endorsed, or to whom, by its terms, it was made payable—then, perhaps, the objection taken by the defendants, would be valid. But, in many instances, these facts only afford *prima facie* evidence of the legal interest. In the case of an endorser who, on the failure of the maker of a note, or the acceptor of a bill, has been obliged to take it up; it is plain that although his name still remains on the bill, yet, by the fact of payment, the legal right to it is revested in him—and that, on producing the note and proving this pay-

ment, he can recover on it. So, where the drawer has been obliged to pay the amount of a bill of exchange to the payee, in consequence of the acceptor's failing to discharge it. And in the latter case it surely would not be necessary to strike out the name of the payee in order to maintain the action. To require such a formality would indeed be inconsistent with the allegation necessary to enable the drawer to recover from the acceptor.

Being satisfied, therefore, that the fact of the endorsement remaining on the bill, was not conclusive evidence that the right was out of the petitioner, we think the court did not err in permitting the person to whom it was endorsed, to prove that he had no title to the note; and certainly he could not have given better evidence of this fact, than by first sueing in the name of the endorser, and then striking out the endorsement.

There is nothing in what has been just said which has a tendency to shake the doctrine established in the cases of *Thompson* vs. *Flower & al* and *Robson* vs. *Early*. In neither of them did there appear any evidence of right to the instrument sued on, but that which resulted from the possession of it. In

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the latter case, it was the *endorser,* and not as here the *endorsee,* who offered to strike out the endorsement. The expressions used in the case of *Moore* vs. *Maxwell,* must be understood in relation to the case then before the court. The whole opinion is predicated on the want of evidence to shew the plaintiff had any interest in the note. *Vol.* 1, 301, 378. 2*d. ibid* 249.

The second question which the cause presents, also arises on a bill of exceptions. The defendants offered to prove, at the time the mortgage was executed, an admission had been made by the plaintiff, that there were losses on the partnership which had existed between the parties, for the purchase of cotton, to the amount of $1600, for which the petitioner had promised to send one of the defendants goods. This evidence was objected to, and rejected by the court.

The claim set up in the answer, was one in *reconvention,* and was too general. Such demands should have the same certainty as a petition. The evidence offered was to prove a distinct contract to send goods, of which no intimation was given by the pleadings; and it was attempted to be proven by the most

dangerous of all evidence, parol proof of the admissions of the party.

We think, therefore, the judge did not err in rejecting the testimony, but he erred in giving judgment against the wife, as by the evidence introduced by the plaintiff himself, it appears she was not bound by the contract. Wives are not responsible for the agreements which they enter into jointly, or jointly and severally, with their husbands, unless it is shewn they have renounced those laws made for their protection, or that the contract has been profitable to them. 7 *Martin*, 465. *Vol. IV*, 388, 230.

As it is possible the husband may have a claim against the plaintiff, for the losses sustained by the partnership, we shall reserve him his right to enforce it in a separate action.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the plaintiffs do recover of the defendant, Joseph Gerbeau, the sum of two thousand eight hundred and forty-two dollars and fifteen cents, with 3 per cent. interest from the

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25th of August 1821, until paid, and costs in the court below, those of appeal to be borne by the appellee And it is further ordered, adjudged and decreed, that the mortgaged premises be seized and sold to satisfy the judgment rendered in the case; and that nothing contained in this decree shall affect the right of the defendant, J. Gerbeau, to hereafter enforce any claim for losses sustained by the partnership set forth in the annexed answer filed in the case.

Brownson for the plaintiff; *Simon* & *Fennessey* for the defendants.

CARLIN vs *DUMARTRAIT & AL.*

APPEAL from the court of the fifth district.

The transfer of a debt vests only an inchoate right and till notice to the debtor, it may be sued by a creditor.

MARTIN, J. delivered the opinion of the court. The plaintiff claims, adversely to the defendants, the amounts of sundry notes (and a judgment thereon) of Charles Massicot, transferred by Labarthe to the plaintiff, and sued by the defendants as a creditor of Massicot. The former had judgment, and the latter appealed.

We think the district court erred. The

plaintiff's right was an inchoate one, under the transfer or assignment of Labarthe's right, until notice was given to Massicot or his heirs—and until then Labarthe's interest was liable to be sued by any of his creditors. *Civ. Code*, 368, article 128. We look in vain, in the statement of facts, for such a notice. It is sworn that the defendant was agent of Massicot's heirs, and he had some knowledge of the plaintiff's right—and the nature of his agency does not appear, and it should have been shewn that he was such an agent, to whom notice might have been given. *The State Bank* vs. *Ellery*, *vol* 4, 87. See also *Bainbridge* vs. *Clay*, *ibid* 56.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided, and reversed—and that there be judgment of nonsuit, with costs in both courts, against the plaintiff and appellee.

OZANNE vs. *DELILE.*

On an application to dismiss a tutor, evidence may be given of his incorrect conduct in transactions with other

APPEAL from the court of probates of the parish of St. Martin.

PORTER, J. delivered the opinion of the court. The petitioner states that he is mater-

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nal uncle to the children of the defendant; that their mother is dead, and that the defendant is a man of wasteful, extravagant, and depraved habits; that, by his bad management, he has reduced himself to a state of bankruptcy; that in conducting the affairs of his children, he has manifested dishonesty and bad faith—that he has never taken the oath required by law, nor has he made an inventory—that he has no fixed domicil—and that he has lately clandestinely absconded from the parish of St. Tammany, where he resided. The petition concludes by a prayer, that the defendant be deprived of the tutorship of his children.

An amended petition was afterwards filed, in which the defendant was charged with the intention of selling his children's property, and removing to France—with defrauding his creditors—and with failing to give security for his faithful administration as tutor.

To these allegations, the defendant opposed a general denial; and the parties being heard in the court below on the merits, judgment was rendered in favor of the defendant, from which the plaintiff appealed.

The cause appears to have been most ob

persons, when they have been specifically stated in the complaint.

He cannot be allowed to shew that the petitioner (who does not solicit the tutorship) lives with a woman of color.

On a charge of bad morals in the tutor and of such neglect as endangers the miner's property, evidence cannot be given of the neglect of their education.

It is not a good ground for the *removal* of the natural tutor, that he failed to make an inventory in ten days after his appointment.

Neither is his insolvency *before* his appointment, a cause of removal.

stinately contested in the inferior court. There is a vast mass of evidence, oral and written, and the record loaded with bills of exceptions.

The first is taken to an opinion of the court refusing the plaintiff permission to prove certain acts of misconduct of the defendant, in his transactions with third persons. The testimony was objected to, on the ground that the transactions attempted to be proved, did not relate to the management of the affairs of the minors.

We think the judge erred. The facts attempted to be proved, were charged in the petition. The evidence was, therefore, not subject to the objection that the defendant was surprised by its introduction. The principle on which it was rejected, would establish a rule that we do not consider correct. A natural tutor may prove to be so base and dishonest, in his transactions with other men, that it would be wholly unsafe to permit him to have the education of even his own children entrusted to his care. The law declares it a ground of deprivation, if the tutor be a man of conduct notoriously bad, or of depraved morals. There can surely be no

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safer or better mode of establishing the last mentioned cause of exclusion, than to allege the special facts, and prove them on the trial. As the evidence excluded comes up on the record, we will give the plaintiff the benefit of it, when we come to examine the case on its merits.

The second bill of exceptions was taken to the opinion of the judge, permitting the defendant to prove that the plaintiff lived with a woman of colour. We are at a loss to conceive why the evidence was offered; or, if offered, why the defendant thought it important to exclude it. The plaintiff does not ask to be appointed tutor to the children—*his* faults, or misconduct, cannot in any respect make the position of the defendant better or worse. The judge certainly erred in admitting it, but it is wholly irrelevant, and cannot have any effect on the decision of the cause.

The next exception presents the question, whether the plaintiff could give in evidence the inattention of the defendant to the education of his children. This was opposed, because no such allegation was made in the petition. It was rejected by the court, and

in our opinion correctly. The pleadings charge bad morals in the father, and such mismanagement in his own affairs, and those of his children, as will endanger the loss of their property. No averment is made that he had neglected either their moral or mental education; and if these things were to be added to the catalogue of his offences on the trial—and nothing more serious could be urged against him—he should have had such notice, as would have enabled him, either to prove the charge incorrect, or to have shewn the causes which prevented him from discharging one of the most important duties which, as a father and a citizen, he owed to his children and society.

The next question which the numerous exceptions on record present, is to the admissibility of various records and documents, tending to explain the transactions of the defendant as syndic of his own estate; and also the record of a suit of *Beauvais* & *al.* vs. *Delile*. The documents first mentioned, were correctly received, for his misconduct in relation to the matters which these papers treated of, is made a part of the depravity charged on the defendant. The objec-

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tion that they were between third parties, comes with a bad grace from the plaintiff, who urges the transactions of the appellee with others as a ground of his removal. What it was legal for the plaintiffs to prove, it was legal for the defendant to disprove.

The record of the suit of *Beauvais & al. Delile*, was offered to shew that several of the maternal relations of the children who are the principal witnesses in the cause to prove the depraved conduct of the defendant, once instituted a suit against him for the same object for which this action is brought: and that they afterwards dismissed it, in order to make themselves witnesses, as none could be found out of the family, to prove the bad conduct of the appellee. It would seem that any deduction of this kind, could have been made almost as strongly after the evidence was gone through, from the fact that no other important testimony of this kind did appear, but that furnished by the maternal relations. But as the defendant may have believed it important to shew that the want of other proof existed from the moment the proceedings commenced, and was not produced by the accidental absence of the witnesses; and as the

fact of the evidence coming almost entirely from that quarter, is certainly open to observation, we do not think the judge erred in permitting the papers to be read.

The next objection goes against the court admitting a copy of the inventory made by the defendant as tutor, because it should have been executed within ten days, and was otherwise defective. The judge considered this objection as going to the effect of the proof, and not to its admissibility—we agree with him, and we shall see what weight this objection is entitled to, when we come to the trial of the merits of the case.

The last exception we find it necessary to notice, is that taken to an opinion which suffered the deposition of one Meyers to be read. It is objected that this deposition contains evidence which is hearsay, and speaks of facts not at issue in the cause. The last objection would have been, perhaps, good, if the plaintiff had not opened the way for the evidence, by introducing proof which the testimony of the witness went to contradict. As to its containing hearsay, we have looked, in vain, through the deposition, for any support to the objection. The only fact which is sworn to

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be derived from a conversation with the defendant, and it is not very material, is afterwards stated positively from the deponent's own observation to be true. We allude to the account given of the disease in the defendant's eyes.

On the merits, the cause presents three questions:

1st. Whether the appellee should not be deprived of the tutorship, for having failed to make an inventory within ten days after his appointment.

2d. Whether the bankruptcy of the defendant prior to his becoming tutor, should now be a cause of deprivation.

And 3d. Whether the evidence shews the defendant to be a man of conduct notoriously bad, and of depraved morals.

1. In support of the first, the plaintiff has referred to the provision in our late code which required the inventory to be made within ten days. He has also read to us the commentaries of French jurists, and the decisions of the tribunals of France, on an article in the Napoleon code, similar to ours. It may be true, that the law is so understood in France, but it has escaped the attention of counsel, that in construing our law, tho' it

may be expressed in the same language as that of the Napoleon code, we are often compelled to come to a different conclusion from that which is rightfully drawn from it there, because the textual provisions of our statutes, must be interpreted in relation to our former jurisprudence.

Our code does not formally declare that the failure to make an inventory in ten days, is a cause of depriving the tutor of the tutorship; it only directs the tutor to do so; we must therefore look to the ancient laws of the country, to see whether any such penalty was affixed to such neglect. By a reference to them, we find, that the dative, legitimate and testamentary tutor, could be deprived of their office if they failed to make an inventory, but that this penalty did not attach to the father. As therefore the provision in our code does not declare, that the failure to make an inventory is a cause for excluding the father from the tutorship, and as the Spanish law did not pronounce the forfeiture for this cause, we are at a loss to conceive on what grounds we can impose it. It would be going too far for a court to say, that the prescribing the same duty by a new law

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to one class of tutors, that was formerly required of another, brought with it the same penalties for the breach of it. This would be legislating by analogy, not reasoning by it. Penalties ought not to be extended by implication, more particularly where the reason on which we must suppose the rule founded does not apply. All other tutors except the natural, require the confirmation of the judge, and when they make the application to be so confirmed, the law may well presume they are in a situation to go on and make the inventory within ten days. It makes no presumption on their affection to the minor; and presumes danger to his interests from the neglect of the tutor to furnish evidence of the property which comes into his hands. But by the death of the mother the tutorship is thrown *ipso facto* on the father. He may be at a distance when that event takes place. He may be confined himself to a bed of sickness, and without taking these exceptions to the general rule, we may we trust say, that in the greater number of cases there is a moral impediment to his doing so. There are few we hope, who within ten days of an event which had deprived them of

their wife, and the mother of their children, who could have the composure of mind necessary to the making a correct inventory of the property, which had been the fruit of their mutual labor and care. *Civ. Code. Febrero, p. 2, ti. 1, cap. 1, § 2, n. 198.*

II. The second ground which is also one of law, is easily disposed of. Our code says the failure of the tutor *after* the appointment, shall be a ground of exclusion. This we consider a clear expression of legislative will that the failure before was not. *Vol. 4, 379.*

III. The third ground which is one of fact, in relation to the unworthiness of the father, presents more difficulty than any other in the cause. The evidence as we have already stated, is voluminous, and to enable others to judge of it, the whole, oral and written, would have to be inserted in this opinion. This the limits of a judicial decision will not permit. We have perused it with the utmost attention. The principal evidence of the depravity of the father is derived from the relations of his deceased wife. And though it is true, that such evidence has the advantage of coming from those who had the best opportunity of knowing his morals, yet it is strange

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that if his conduct be such as they represent it, no other material testimony could be given in relation to it. What judgment our duty would require us to pronounce, if the case was before us without the presumptions that attach to a judgment in the court below, we should perhaps have great difficulty in saying. The defendant however stands before us, with the decision of a judge in his favor, who knows the parties; the witnesses—and who heard them, and saw them give their testimony. This circumstance turns the scales which would otherwise perhaps stand even. Nor can we say he erred. The law it is true provides, that not even the father, shall retain the direction of his children, if his conduct shews, that he is incapable of rearing them in that manner, which will make them good members of society. But that law values in a high degree, and presumes much, on the strength of natural affection; and knows that in general it cannot trust to any surer pledge, than that which is furnished by parental attachment. The evidence therefore should be strong and conclusive, that would destroy that presumption: that would fix a stigma for life on the parent: which would deprive him, if he has

the common feelings of our nature, of one of the greatest delights human existence affords, and at the same time cut off his children from enjoying parental affection, and learning how to repay it.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Baker & *Simon* for the plaintiff, *Brownson* for the defendant.

GONSOULIN'S HEIRS vs. *BRASHEAR.*

APPEAL from the court of the fifth district.

A party who obtained the governor's order to be put in possession of vacant land, in 1783, but does not appear to have taken it, cannot eviet one who obtained a similar order in 1802, and is in possession under it.

PORTER, J. delivered the opinion of the court. The plaintiffs claim a tract of land in possession of the defendant, who pleads title to it in himself.

Both parties assert a right to the premises in virtue of orders of survey issued by the Spanish government, and since confirmed by the commissioners of the United States. The *locus in quo* is admitted to be the same.

That of the plaintiff is eldest. It is dated in the year 1783. The petitioners in their *requete* state, that the island which they soli-

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is situated about four leagues to the west of the mouth of the river Chaffalaya, and that they wish to obtain a title in order that they may form an establishment, to supply the capital in case of need with pork and bacon.

The commandant of Attakapas certifies, that the land solicited is of no value, except for the objects mentioned in the *requete*. The governor directs the surveyor general, to place the petitioners on the land solicited, conformably to their memorial.

From the issuing of this order of survey up to the time of applying for the commissioner's certificate, in the year 1816, it does not appear that the plaintiffs or those under whom they claim, ever exercised any acts of ownership over the land in question. They never placed slaves or hogs on it, as they stated in the petition they would do: nor ever paid taxes on it as making a part of their property. An attempt was made on the trial to prove they had complied with the engagement contained in their *requete*, but the evidence wholly fails to establish it.

The title of the defendant is founded on an order of survey, dated in the year 1820. An actual survey of the premises was made. An

actual settlement took place, and with the exception of three or four years absence, during which time taxes were regularly paid, the land has been inhabited up to the commencement of this suit.

The government of the United States have relinquished their title to both, and the parties so far as their rights may depend on any sanction from that source, stand with equal pretentions before the court. They are therefore both thrown back on their titles, under the former government. If these titles were complete grants, their date would decide the question, for the title having once passed from the sovereign to the subject, he could not grant it to another. But the orders of survey on which each of the parties claim, left the title or dominion of the soil vested in the government. They furnished an equitable right to those in whose favor they issued, to demand a title of the grantor, but nothing more; a reference to the various negotiations made by the Spanish authorities during the time Louisiana was possessed by that government, we think clearly shews, that the dominion of the soil was not to be considered as vested in the person applying for land, until the grant issued. The

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government of the United States when they took possession of the country, by requiring all those who had inchoate titles to present them for approval, shewed that they considered they required confirmation, and a patent to vest the title.

As therefore the legal title was not vested in either plaintiff or defendant under the former government, their rights must be decided by ascertaining which of them had the strongest equitable one, or in other words, which of them according to the laws, usages, and customs prevailing while that government had possession of Louisiana, would have had the best right to the premises.

We think there cannot be a doubt the defendants would. The policy of the Spanish government, as is well known, was to invite emigration and promote the settlement of the country. All the general regulations in relation to land in the province, and almost every order of survey they issued, proves that the motives just mentioned were the ruling ones. Repeated proclamations of the governors declared all orders of survey null, the land conceded in which, was not settled within a limited time. The plaintiffs pretentions tried by

this test are entirely defective In 1783 their ancestor applied for the land, and held out to the government as an inducement to grant it, that it was unfit for any other purpose but that of raising hogs, and that if given to him he would proceed to place slaves and swine there to succour the capital with meat of that kind. During the space of nineteen years that had elapsed from the granting this order of survey until the issuing the second, he failed to comply with the promise. It was not surveyed, nor settled, nor even taxes paid on it. Under such circumstances, as there was no legal obligation on the part of the government to issue a grant for the land, we are satisfied there was no moral one. And we are of opinion that if the parties now before us were each claiming a title from the Spanish government had it remained here, and contesting the validity of each others pretentions, that the title of the defendant would prevail.

This opinion renders it unnecessary to examine the question of prescription.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Simon & *Baker* for the plaintiffs, *Brownson* for the defendant.

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DUMARTRAIT vs DEBLANC & WIFE.

DUMARTRAIT vs. *DEBLANC & WIFE.*

A wife cannot offer to prove, without having pleaded, that the note was given for a debt of her husband and not for her benefit

No issue is to be tried, which is not presented by the pleadings.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. Mrs. Deblanc, sued on a note, executed by her son, in her name (and with the authority of her husband) jointly and severally with a third party, pleaded her coverture at the time of the execution and the plea, and the consequent invalidity of the note: and being required to answer whether the note was not executed as stated in the petition, replied that she did not authorise her son to subscribe the note for her, but it was subscribed contrary to her wish and by the concernment of her husband; judgment was given against, her and she appealed.

The statement of facts admits the execution of the note, and its endorsement by the payee to the plaintiff.

The subscribing witness deposed the note was executed willingly by Mrs Deblanc.

The deed of separation of property between her and her husband, with the appraisement of the property surrendered to her by her husband, was made a part of the record.

A bill of exceptions was taken by her coun-

sel to the opinion of the district court who refused her leave to inquire from the subscribing witness, whether the note was not given for the debt of the co-obligor, and not for her advantage and benefit.

We think the district judge did not err, if she wished to avail herself of this circumstance (admitting its existence) it ought to have been stated in the answer, that the plaintiff might come prepared to gainsay it.

On the merits, this is a note executed by a married woman, separated of property from her husband, and with his authorisation. The answer neither denies its execution, nor alleges any violence, compulsory or improper interference of any one.

Her answer to the interrogatory makes no part of the pleadings nor of her answer to the petition, and no issue was to be tried except that which was presented by the petition and answer; the latter denies no *fact* alleged, it only denies the *consequent* liability of the wife. She pleads no new fact, for the coverture was alleged in the petition.

The capacity of a married woman to bind herself *as a surety*, forms no part of the inquiry which ought to precede the judgment in this case.

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DUMARTRAIT vs. DEBLANC & WIFE.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Simon for the plaintiff, *I. L. Baker* & *J. Baker* for the defendants.

GARLAND vs *LOCKETT.*

The attorney in fact of absent heirs may maintain an action in his own name on a note he received in settling their claim against the maker.

The past use of money is a good consideration to support a promise to pay interest.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The defendant, who was testamentary executor of Robert Pamphlin, deceased being indebted to the succession, gave his note to the plaintiff, attorney in fact for the absent heir, for the balance due, and added to it interest at five per cent. for the time he had the use of the money, which appears to have been nearly five years.

This action is instituted on the note thus given, and the defendant has presented two objections to judgment being rendered against him.

1st. That the note was given to the plaintiff as attorney in fact for theheirs of Pamphlin, and that he cannot maintain an action in his own name, but as representative of the persons for whom he acted.

2d. That the promise to pay interest for the time the money had remained in his hands was without consideration, and void.

I. The plaintiff could well maintain this action in his own name. By taking the note he became responsible to the heirs for the amount, and he of course had a right to enforce it. The argument that this judgment will not form *res judicata* against the heirs is certainly correct. But the receipt which the defendant took from the plaintiff at the time he gave the note will protect him against their demand. And these proceedings will secure him from any further claim on the part of the petitioner whom he made his creditor by executing the note.

II. The use of the money formed a good consideration on which the promise to pay interest was made. There was a moral or natural obligation on the part of the defendant to compensate the heirs for the advantage he had derived from using their money. And it became a legal one by the agreement he entered into with the plaintiff. The contract was that which is denominated in our law *constitutæ pecuniæ*. The examples given by Pothier shew, that by it, natural obligations ac-

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quire the force of legal ones. *Pothier, traite des ob. Part. 2, chap. 6, sec. 9, du pacte constitutæ pecuniæ, n. 3 & 8. See, also, 2 Blackstone Com* 446 & 1 *Cowper* 290.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Garland, in person, & *Bowen*, for the plaintiff, *Baker* & *Ogden* for the defendant.

DEBAILLON vs. *PONSONT.*

An appeal lies from a refusal to set aside a writ of sequestration.

It cannot issue on an affidavit that the defendant intends to remove his property out of the parish

The term *jurisdiction of a court* in relation to place means the limits within which its original process extends, not where its writ of execution may run.

APPEAL from the court of probates of St. Landry.

PORTER, J. delivered the opinion of the court. This appeal is taken from a refusal of the judge *a quo* to set aside a writ of sequestration, and the first question presented is, whether the decision be such a one as will authorise an appeal to this court.

We are of opinion that it does. This writ has a most extensive application, and under it the whole of a man's estate may be seized. If wrongfully sued, it might work his ruin. The possession and use of the property of the defendant may be necessary to the maintenance of his credit;—to the performance of his obliga-

tions to others:—nay, to the very existence of himself and family. A judgment rendered in his favor after years of litigation, restoring to him this property, would come too late to afford a remedy. The injury done might be irreparable. We cannot distinguish this case from that of *Lecesne* vs. *Cottin*, cited in argument. 10 *Martin* 174.

We have next to inquire whether the court below committed any error in its judgment. Many grounds of reversal have been alleged here. The opinion we have formed on one of them renders it unnecessary to examine the others.

The code of practice provides "that a creditor by special mortgage shall have the power of sequestering the mortgaged property, when he apprehends that it will be removed out of the state." *C. Prac.* 275.

The act of 1826 which amended this code, declares, "that in addition to the cases mentioned in articles 274 and 275, the plaintiff may obtain a sequestration in all cases where he has a lien or privilege on property, on complying with the requisites provided by law." *Acts of* 1826, 170, *sect.* 9.

The claim set up by the plaintiff is of that

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kind for which the amendment just quoted provides. The requisites necessary to obtain it, we understand to be the same as those required for obtaining the writ on a special mortgage. The act of the legislature only extends the cases where the writ may issue, but makes no change in regard to the affidavit and security.

The defendant contends, the affidavit was not such a one as the law requires.

That part of it in relation to the intention of the defendant to abscond, is in these words, "That the defendant John Ponsony, left the state of Louisiana about two years since, without having rendered any account of the administration of the minor's property: that the said John Ponsony, has attempted by a fraudulent and collusive sale, to remove all his property without the parish of St. Landry, and to place it beyond the control of the said minors; and for the purpose it is believed of preventing their claim, as set forth in the petition, from being paid: that said John Ponsony, though lately returned to the parish, has no permanent or fixed residence within it: and this deponent verily believes, that without the aid of the writ of sequestration prayed for, the said

John Ponsony will remove his property beyond the jurisdiction of the court of probates of the parish of St. Landry, before in the ordinary course of proceeding, judgment can be had against him, and execution issued thereon."

The affidavit contains no allegation that the defendant is about to remove his property out of the state, as the law requires it should. It alleges that he is about to remove it out of the parish of St. Landry, and beyond the jurisdiction of the court of probates of said parish. The assertion contained in this oath would be satisfied if the defendant only moved into the next parish. The plaintiff has contended, that as the writ of execution runs all over the state, and as the affidavit avers that the property is about to be removed out of the jurisdiction of the court, *it must be held to mean*, a removal out of the state. But to this argument we cannot assent, and there are several satisfactory answers to it. In the first place, the "jurisdiction of a court" in legal language does not mean the space of country over which its writs of execution run, but the limits within which its original process extends. Thus the Code of Practice in defining it states,

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that the word, as it respects place, "means the space or extent of country over which the judge is entitled to exercise the power of judging. *C. Pr c* 76. Again, the writ of execution from the court of probates cannot run over the state, as is the case with that which the district or parish courts may issue. And lastly, were we even to admit that jurisdiction *quaod* the writ of execution, may mean to the limits of the state, the plaintiff by connecting with it the averment "out of the Parish of St. Landry," renders it quite doubtful if he did not use the words in relation to the extent of that parish, and the affidavit should not be doubtful, but clear. The remedy by sequestration, like that of attachment, is one of great severity, and the party claiming the benefit of it should bring himself clearly within the law. The language of the statute is plain, and if the truth of the case had permitted the assertion, the plaintiff could have easily said the defendant intended to remove out of the state. The presumption therefore, is, that the facts did not authorise such an allegation. That if they had, the plaintiff would not have left that to be *inferred*, which might have been so easily *expressed*. We do not

believe the plaintiff intended to swear the defendant was about to remove out of the state. If he was charged with having sworn so in a court of criminal judicature, we are certain that no such charge could be maintained.—We therefore feel bound to say, that the affidavit is defective: that the writ issued improvidently, and that it must be set aside.

It is ther fore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the writ of sequestration be set aside and the property seized under it be released, that the cause be remanded to be proceeded in according to law, and that the appellee pay the cost of this appeal.

Todd for the plaintiff, *Garland* & *Simon* & *Markham* for the defendant.

STILLE vs. *BROWNSON.*

A purchaser at a sheriff's sale cannot obtain the cancelling of the twelve month bond, on the ground that she acquired no title, unless she be evicted.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff, a purchaser at a sheriff's sale, gave a twelve month bond, which she now seeks to have cancelled on the ground

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that she acquired no title, the judgment on which the execution issued being void. There was judgment against her, and she appealed.

It is not alleged that she is sued and disturbed in her possession, and this case cannot be distinguished from that of *Abat* vs. *Casteres*, 3 vol. 220, in which we held that the purchaser at a sheriff's sale cannot refuse payment on the ground he acquired no title, unless he shews he was evicted. See also *Tabor* vs. *Johnson & al. id.* 674.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Isaac L. Baker & Joshua Baker for the plaintiff, *Brownson in propria persona*, for the defendant.

DAY & WIFE vs. THIBODEAU.

A will, valid and legal, according to the law of the place in which it was made, vests the property bequeathed in the legatee.

APPEAL from the court of the fifth district.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiffs, who are here appellants, sue to recover a female slave and her increase, which they allege to be in the possession of the defendant and appellee without title.

The title set up on the part of the plaintiffs is in right of the wife, and is stated to be derived from one of her ancestors, by virtue of a will or testament, wherein a life estate in said slave was given to another person, and the reversion to the plaintiff, in whose right the present action is instituted.

The will is shewn to be valid and legal, according to the laws where it was made and took effect, and consequently vested a title in the appellant, and right to take the property devised after the decease of the person who held the life estate. She is shewn to be dead, which together with the establishment of the legality and validity of the will, under which the plaintiffs claim, settles all question of law in relation to their title.

The only question of fact material in the cause, relates to the identity of the slave. This is not only proven by testimony properly received in the cause, but it is also admitted by the answer. We are therefore of opinion that the verdicts of all the juries are erroneous, being contrary to the admissions in the pleading in relation to facts, and also to the whole evidence of the case.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and proceeding here to give such judgment as ought there to have been given.

It is further ordered, adjudged and decreed, that the plaintiff and appellant, do recover from the defendant and appellee, the slaves as described in their petition, with costs in both courts.

Simon & *Bowen* for the plaintiffs, *Baker* & *Brownson* for the defendant.

SKILLMAN & WIFE vs. *LACY.*

The court of probates is not without a jurisdiction *ratione materiæ*, in a case in which some of the defendants are minors & some majors.

The issue of a mortgaged female slave, born after a sale by the mortgagor, are in the hands of the vendee unaffected by the mortgage.

APPEAL from the court of probates of the Parish of St. Mary.

MATTHEWS, J. delivered the opinion of the court. This is an appeal taken by the heirs of the original defendant, who died since the judgment rendered in a suit against him, from a judgment given in the court above stated, against them in their capacity as heirs, which decreed the original judgment to be executed.

The first objection to the proceedings of the plaintiffs, is a plea to the jurisdiction of

the court of probates, which comes rather ungraciously from the defendants, as they had succeeded in a plea of the kind before the district court, in consequence of which, the present suit was commenced before the court of probates. We are of opinion that the latter court is not wholly without jurisdiction *ratione materiae*, and although some of the defendants might possibly have been sued before the tribunals of ordinary jurisdiction, yet as part of them are minors the whole affair was well submitted to the probate court, more especially as to a mortgage on property of their ancestor.

Another objection is found on the record to rendering the original judgment executory, on account of uncertainty. We however believe it to be sufficiently certain to authorise the seizure of the mortgaged property, being clear and explicit to the amount of $3000.

Having thus disposed of these preliminary difficulties, we proceed to examine the errors complained of by the appellant in the judgment rendered by the court below. The property on which the tacit mortgage of the plaintiffs existed was two slaves, one of whom is a female. They were sold and delivered

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into the possession of the ancestor of the defendants by the legal owner, against whom the mortgage which affected them was raised by operation of law. After the sale and transfer above stated, the female slave had several children, who by order of the court of probates have been seized, with the mother, and directed to be sold to satisfy the plaintiffs demand. This part of the judgment, the defendants allege to be erroneous, and insist, that however well established the general principle of law may be, that the fruits of mortgaged property are subjected to the mortgage while in the hands of the mortgagor; they cease to be subject to that bond or lien, when they accrue after a regular transfer of the original property to a *bona fide* purchaser and possessor. The doctrine thus assumed by the counsel for the appellants is, in our opinion, fully supported by the authorities which they cite. *See Cu. Phi. ver. Hypoteca* & R. D. B. 20, 1, 291. But it is contended on the part of the plaintiffs, that as some of those children, if not all, were born since the commencement of the suit against Lacy the ancestor, he and his heirs have been, ever since that period, possessors in bad faith and

are therefore bound to suffer the fruits or offspring of the slave, to be sold for their benefit. We are, however, of opinion, that a possessor under a legal title, in good faith, does not lose the advantage of such good faith until an order of a competent tribunal compels him to surrender to some equitable claim or lien the property by him thus legally held. According to the laws above cited, the children of the female slave, being born whilst the mother was in the possession of the ancestor of the plaintiffs, they became his property in clear and absolute ownership, unencumbered by the tacit mortgage of the appellees; and we have been unable to discover any facts in the record which in any manner infringe this absolute right acquired by the father, and which has descended to his children.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be avoided, reversed and annulled: and it is further ordered, adjudged and decreed, that the order of seizure and sale, which is hereby granted, be restrained to the property or slaves who were affected by the mortgage of the plaintiffs, whilst they were in

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the hands of Haney, the vendor to Lacy, and it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal.

Simon & *Bowen* for the plaintiffs, *Baker* & *Brownson* for the defendant.

SPRIGG vs *BOISSIER & WIFE.*

The wife is not bound by a note executed jointly with her husband, even in the hands of an endorsee: and when it was given for property, bo't by the husband, during the marriage.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This action was instituted by the endorsee of a promissory note, against the defendants, makers thereof.

There was judgment in the district court against the husband and in favor of the wife. The plaintiff appealed, and has complained of that part of it, which exonerated the latter from responsibility.

The note is in the usual form of negotiable paper, it is joint and several, and it is shewn by the evidence, that it was given in payment of property purchased by the husband.

The contract therefore did not bind the wife, she was in reality nothing but surety, and we have held that the prohibition against her entering into such contract, could not be avoid-

ed, by giving to the agreement the form of an obligation *in solido*. *Vol.* 2, 39, *Banks* vs. *Trudeau*.

But the appellant urges, that this contract must be as binding on the wife, as if she was named vendee in the act of sale of the property for which the note was given. "Because whether the act of sale be made to the husband alone, or to the wife, or to them jointly, the effect is the same if it results to their common benefit."

It is true the benefits of a purchase made by the husband may be shared by the wife, but it is not true that she becomes the owner of the property, for he may sell it, exchange it, or even give it away without her consent. Had her name been inserted in the act of sale she would have held the one half of the land in her own right. It could not have been alienated without her consent, and without the pursuance of those formalities which the law has established for her protection. There is no ground for assimilating the two contracts, and we are quite clear, that the agreement entered into in this case did not bind the wife.

The appellant however, insists that though this note might not have been good in the

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hands of the payee, yet that in those of an endorsee for a valuable consideration, the wife cannot resist the payment. This doctrine if sanctioned by the court, would certainly afford a safe and compendious way, of evading the whole of our laws for the protection of married women. In support of this position he has relied on that part of our mercantile law which prevents the *consideration* of a note being gone into in an action by the endorsee, and has referred us to several cases where it has been held, that unless the illegal consideration was such as made the contract void, the maker could not resist the payment. This is true when the objection arises from the *consideration*, but when it is derived from the incapacity to contract, then that, which had not a binding effect when it was made, cannot acquire it by endorsement. Thus by the law merchant, the contract of the infant is only voidable, and yet a note executed by him, cannot be recovered on by the endorsee. Admitting the act by which a married woman becomes surety for her husband to be voidable only, we are unable to distinguish her case from that of an infant at common law But it is unnecessary to put the case on that

ground, for the law of Toro, so often cited in the court, declares that the engagement of the married woman, by which she became surety for her husband, shall be of no effect, unless it is proved to have been beneficial to her. *No queda obligada, a menos que se prueba haberse convertido la deuda en su provecho.*

West's Dig. 103.

Sprigg vs. Boisseir & wife.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

King & *Markham* for the plaintiff. *Todd* and *Simon* for the defendants.

HODGE vs. *EASTIN.*

Evidence may be given that a partner endorsed the note for the firm, altho' it be not averred that the partnership was a commercial one, nor that the partner had authority to administer its affairs.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The plaintiff, endorser of several notes executed by the defendant, instituted this action, to recover the balance due on them. At the trial, objection was taken that the obligations contained in the petition did not authorise the introduction of the testimony necessary to maintain the plaintiff's right to recover, and he was non-suited.

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Hoder vs Eastin.

The petition alleges that the defendant was indebted to the plaintiff, by having executed his promissory notes, payable to the order of Henry E. Fugeman, who endorsed them to the firm of Bargebur, Oehmichen & Co.; and that said firm endorsed them to the petitioner.

On the plaintiff offering testimony to prove that the endorsement was made in the hand-writing of one of the members of the firm, it was objected that this evidence could not be received, because there was no averment in the petition, that the partner, who had signed in the partnership name, had the administration of its affairs. Proof was then offered, that the firm was a commercial one; and this, also, was objected to, because there was no allegation in the pleadings, that the firm was a commercial one. The court sustained the defendant in both these objections.

We are of opinion it erred. It was sufficient to state the endorsement according to its legal effect. It was not necessary to aver the means by which that effect was produced. Even according to the rules of the English jurisprudence, which, in matters

of pleading, are much more technical than ours, a bill of exchange, accepted by an agent, may be declared on as accepted by the principal. The counsel have endeavored to distinguish that case, and others similar, from this; on the maxim *qui facit per alium, facit per se.* But we can see no distinction, for if the company sign by a partner who has their authority to bind them, does he not stand precisely in the same light? and do they not do by themselves, what they do by him? An objection somewhat similar to this, was taken in the case of *Oldham* vs. *Croghan*, and overruled by the court. *vol.* 3*d*, 520. See, also, the cases of *B yd & al. Howard, ibid*, 286, and *Gilly* vs. *Henry*, 8 *Martin* 402.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed—and it is further ordered, adjudged and decreed, that this case be remanded to the district court, with directions to the judge not to refuse the plaintiff permission to prove that the firm of Bargebur, Oehmichen and Co. was a commercial one; and that

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the endorsement on the back of said notes, was in the hand-writing of one of the members of said firm. It is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Brownson for the plaintiff.—*Lesassier, Brown, & Baker* for the defendant.

CHRETIEN vs. *HER HUSBAND.*

APPEAL from the court of the fifth district.

The wife is bound to follow her husband wherever he determines to go.

MARTIN, J. delivered the opinion of the court. The wife seeks a separation of bed and board, and of property, on an allegation of being abandoned—she shews she made the summons to her husband, to return to the common dwelling, which he disregarded.

He answers that the wife is bound to reside with her husband in the marital house, which is that he has selected for the residence of himself and his family—that he has removed, as he had a right to do, from the house in which the wife resides, to another in the same parish, where he is and has ever been ready to receive her, but she refuses to come.

He had judgment, and she appealed.

Her counsel urges that the district court erred in concluding that in the present case there is no abandonment, because the wife is bound to follow her husband wherever he chuses to remove his domicil.

Further, that the record contains no evidence of the readiness of the husband to receive the wife in the house in which he now dwells.

The counsel contends that the law has given the wife the power of suing for separation, in case of abandonment, *Civ. Code*, 139, which is inconsistent with the obligation of the wife to follow her husband wherever he chuses to reside.

The case of abandonment of which the code speaks, is that where the husband abandons the wife, and wanders about without a fixed domicil. Many circumstances may imperiously require the removal of the family from one part of the state to the other. Of the wants of the family, and the means of supplying them, and the place of its residence, the husband is the best judge, and wherever he chuses to go, the wife must certainly follow him. If she remains behind,

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he, and not she, may complain of abandonment.

The husband, in this case, has attested his readiness to receive the wife at his present place of abode—this it is his duty to do—and the wife, if she expects any advantage from his refusal, ought to have shewn it. It is a positive fact, of which the defendant could not be required to administer negative proof.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Robin for the plaintiff—*Simon* for the defendant.

SANDERS vs. *HARDING'S HEIRS.*

The nett proceeds of an estate, are the amount of the inventory, after deducting the debts of insoivent debtors, articles which prove of no value, and its passive debts.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The plaintiff was, on the 29th of Dec. 1820, appointed curator of the vacant estate of the defendant's ancestors, and surrendered it to them on the 31st of December 1821. He did not render his accounts then; but did so a few months afterwards.

The amount of the inventory, on his assuming the curatorship, was $78,894 75 cents. He employed and paid an overseer on account of the estate, and frequently visited the plantation. He made sale of no part of the estate, except the crops, and thus received $4473 35 cents. The estate having been surrendered in kind, the plaintiff claimed his commission on the amount of the inventory.

The defendants urged that the plaintiff had not furnished his accounts within the year of his curatorship, and if entitled to any commission, was not so on the whole amount of the inventory.

The court of probates allowed the commission on $4,473 35 cents, the amount received by the plaintiff in money, and refused it as to the property received, kept, and surrendered in kind. This judgment was reversed by the district court, who allowed the commission on the nett proceeds, or liquidated product or amount of the estate: The defendants appealed.

Curators of vacant estates are bound to render their accounts at the expiration of the time which the law grants to them to

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settle the estate confided to them; and as this period is one year, it follows they are not bound to render their account within the year. In the present case, it appears that the account was rendered a few months afterwards. Even if, in some cases, the neglect to render a timely account occasions the forfeiture of the commission of the curator, we do not think that the plaintiff has lost his right thereto. He appears to have surrendered the estate when called on, and rendered his account a few months after the expiration of his curatorship.

The commissions of curators, from 1809 to 1817, were regulated by the old *Civil Code*, 180, *art.* 141, and fixed at two and one half per cent. on the amount of the inventory, comprising the property of the estate they administer on, with a deduction of the debts due by insolvent debtors, and such articles as proved of no value.

In 1817, by the act relative to courts of probates, &c. p. 186, § 2, the commission was restrained to the "nett proceeds" of the estate—*sur le produit liquide.*

It is contended by the defendants' counsel, that the expression "nett proceeds," is

to be confined to what is reduced into cash: that land, negroes, goods unsold, debts, even of solvent debtors, not collected because not payable, &c. form no part of the aggregate amount of an estate, on which a commission to the curator is due.

We think with the district judge, that the nett proceeds of an estate, is the amount of the inventory, after the deduction of debts due by insolvent debtors, articles which prove of no value, the passive debts of the estate, and costs.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Fennessy & *Lesassier* for the plaintiff, *Brownson* for the defendants.

DURALDE'S HEIRS vs. *GUIDREY.*

APPEAL from the court of the fifth district.

The certificate of the notary, that he notified the endorser by express, although read without opposition, does not establish a legal notice

PORTER, J. delivered the opinion of the court. The defendant is sued as endorser of a promissory note. The plaintiffs in order to establish that they gave due notice of the pro-

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test, has produced a certificate of the notary made under the act of 1821, which is in the following words:

"J'ai de plus par un expres notifie ce meme protet a l'endosseur ce meme jour."

"I further, by an express notified this same protest to the endorser, this same day."

The expression "this same day," refers we presume to the day on which the protest was made, for this certificate is recorded with the protest, and both make but one instrument. The regularity of this may be doubted, but admitting it correct, it is objected, the certificate contains no evidence the protest ever reached the endorser, and we are of that opinion. The act of the legislature already referred to, has made no change in relation to the necessity of establishing these facts, which were always necessary to be shewn in order to bring notice home to the endorser. It has only introduced another manner of proving them. No higher credit can be given to the certificate than would have been given to the oath of the notary, had he testified to the same facts in open court. Proof made in the latter mode that he sent an express, would not be evidence this express reached the endorser.

We do not see how the notary could swear, or can testify that notice of protest was duly served, unless he does so himself, or puts it in the post-office. When he employs the agency of another, neither his oath nor his certificate of what that agent did, is the best evidence of which the case is susceptible. The statute, by requiring the officer to state the manner in which these notices are served or forwarded, negatives the idea that his certificate is to be conclusive. It conveys, on the contrary, a clear intimation that the court was to judge whether in the manner used, the endorser could be considered as having knowledge of the fact. Any other construction would leave these expressions in the law without meaning or motive. Under this act of the legislature the endorser is affected by testimony which he has not power to cross examine. The *ex parte* proof should be therefore clear, and in strict pursuance of the law under which it is taken. It is conferring power enough on the notaries to enable them to bind their fellow citizens by certificates of what they do themselves. It would be monstrous to permit them to certify to the truth of facts, which they can only know from the relation of others.

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The counsel for plaintiff has contended that as the certificate of the notary was permitted to be read without objection, it makes full proof of all the facts contained in it. This is confounding form with substance. If the form merely of the certificate was irregular and it contained the necessary statements of notice, their permitting it to be read would be considered as a waiver of the objection, and that part which was substance would have its legal effect. But where the defect in the certificate is, not containing a legal statement that notice was given, then the suffering it to be read in evidence cannot cure the defect. Indeed it is one which cannot be known until it is read. A copy of a sale from a notary's office *duly certified* could not be objected to as evidence in a suit for property. But after it was admitted, all objections to its effect would be open to the party against whom it was offered.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that there be judgment for the defendant, as in case of non suit with costs in both courts.

Simon for the plaintiffs, *Todd, Lesassier, Bowen, I. L. & J. Baker* for the defendant.

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CASTILLE vs. *DUMARTRAIT.*

APPEAL from the court of probates of St. Martin.

The petition may be amended by praying for the restitution of the property, instead of the payment of its value.

PORTER, J. delivered the opinion of the court. The plaintiff sues the defendant, curator of her late husband, to recover the amount of her paraphernal property received by him during coverture and at the time of the marriage.

The petition concluded with a prayer to have judgment for the value of this property, and after the cause was at issue the plaintiff moved the court to permit her to amend the pleadings, so as to substitute a prayer for the property itself, instead of the value of it in money. This the judge refused, and the plaintiff excepted, and appealed.

The ground on which the judge refused it appears to have been, that it was altering the substance of the demand, and that such amendments are prohibited by the Code of Practice. *Art.* 419.

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If by demand was meant the prayer for relief, which a plaintiff makes in his petition after setting out his cause of action, the judge decided correctly. But this word used in the article of the code referred to, does not mean the relief sought, but the grounds on which the action is instituted. This we think would be manifest on the reason of the thing, for the object of the law was to prevent new causes of action from being put in the petition, which would vary and change entirely the issue joined; not to prevent modifications being made in the relief sought, which is nothing but a consequence flowing from the claim set up. The code itself, however, has explained the word on which this difficulty has arisen. By the 147th article a demand is defined to be a "civil action brought before a court of justice to obtain a thing to which one thinks himself entitled." The prohibition then to alter the substance of the demand, means a prohibition to alter the substance of the action: or in other words, the cause of action. Now nothing of this kind was attempted here, it was only asked to change the prayer for that relief to which the plaintiff conceived herself entitled, on the cause of action which

she had originally set out. In the case of *Albert* vs. *Bayon*, lately decided, we gave the same meaning which we now do to these words in the code in relation to amendments. *Vol.* 4, 516.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the cause be remanded, with directions to the judge of probates to admit the amendment offered by the plaintiff: and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Lesassier & *Bowen* for the plaintiff, *Simon* for the defendant.

FUSILIER vs. *HENNEN*.

The party in possession is not to be dismissed, on his disclaimer, till he call in his lessor to contest the plaintiff's right.

The lessor is bound to intervene, to prevent judgment against his lessee, tho' the suit be not in his, the lessor's domicil.

APPEAL from the court of the fifth district.

MARTIN J. delivered the opinion of the court. The plaintiff claims a tract of land in the possession of the defendant, and damages for the detention.

The answer denies all the facts alleged in the petition, and avers that the defendant

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claims no title to the premises, which are the property of Alfred Hennen, of New-Orleans, under whom he, the defendant, entered and possesses them: therefore he prays to be dismissed.

The plaintiff obtained a rule on the defendant, directing him to cause Alfred Hennen to be cited to appear and defend the cause, or that he, (the defendant) be proceeded against as if he had filed no disclaimer.

Alfred Hennen appeared and pleaded to the jurisdiction of the court, alleging himself to be a resident of another parish, viz: that of New-Orleans. He demanded oyer of the plaintiff's title, and set up an adverse one in himself.

There was judgment for the plaintiff, and the defendant Alfred Hennen appealed.

The only questions which have been presented to us are, whether the suit ought not to have been dismissed on the original defendant's disclaiming and naming the person under whom he held.

And whether the latter was compelled to become a party, or could insist on the suit being brought against him in the parish of his domicil.

The first question was solved, in the case of

Kling vs. *Fisk*, (*Vol.* 4, 391,) in April last. We then said the defendant was not to be dismissed, till he called his lessor in to contest the plaintiff's right, which it would be idle to do if the suit was to be dismissed.

As a vendor cited in warranty may not object that he is compelled to answer out of the parish in which he has his domicil, the lessor brought in by his lessee is compelled to intervene to prevent judgment against his lessee, even out of the parish of his domicil.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiff, *Hennen in propria persona* for the defendant.

ABAT vs. *SIGURA.*

If the endorser of a note plead the general issue, want of notice and fraud, his counsel has not the right of opening the case to the jury.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This action was instituted against the defendant as endorser of a promissory note. There was a denial of notice in the answer, and a plea that the endorsement had been procured

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through the false and fraudulent misrepresentations of the plaintiff.

The cause was tried by a jury, who found a verdict for the defendant. The plaintiff appealed.

When the evidence was gone through, each party claimed the right of opening and closing the argument to the jury. The judge decided in favor of the defendant. This opinion furnished the ground for the first bill of exceptions that appears on the record.

A good deal of the argument in this court has turned on the question whether the Code of Practice was in force in the parish at the time of the trial. We have found it unnecessary to examine the subject in relation to the provisions in the code, for admitting it not to have been in force, and that the rule of the court below was, that he who had the affirmative on the pleadings should open and close the argument, we think the judge erred.

Because, by the answer put in, the defendant had only the affirmative on one of the issues joined. For after admitting the endorsement, and charging fraud, it concludes in these words, "and that except as before stated, the facts and allegations contained in

the plaintiff's petition are untrue, which the defendant will verify."

This threw on the plaintiff the burthen of proof as to notice of the protest, and we understand the rule, independent of positive regulation, to be, that whenever the plaintiff has the affirmative in any one of the issues which the pleadings present, he has a right to open and close the argument.

It has been contended that the error was one which could not have affected the finding of the jury, and that the court ought not to remand the cause.

It is true there might be cases presented to the court where the evidence would so strongly preponderate in favor of the party who obtained this advantage, that not even a presumption would arise, that it was owing to this circumstance the verdict was given in his favor. But admitting the proof given here to preponderate in favor of the defendant, it does not so strongly weigh on that side as to permit us to say that the exercise of professional talent, did not have some influence in turning the scale.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

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be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the cause be remanded to the district court, with directions to the judge to permit the plaintiff to open and close the argument before the jury, and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal. *See the same case in August Term,* 1827.

Grima & *Simon* for the plaintiff, *Lesassier* & *Brownson* for the defendant.

REES vs. *DEJEAN.*

Interest on a twelvemonths bond, is to be paid at the rate of ten per cent. if by the judgment the debtor was to be charged at that rate, till payment.

APPEAL from the court of the fifth district.

MARTIN, J delivered the opinion of the court. The defendant having obtained, in the district court, a judgment against the plaintiff, with interest at 10 per cent. until payment, according to their original contract, sued out *fieri facias*, and the plaintiff's property was finally sold and purchased by himself, at a credit of twelve months, and he executed his bond accordingly with surety, according to law, for $3488, with interest at 10 per cent.

In the present suit the plaintiff seeks relie

on his bond, urging that interest was illegally required at the rate of ten per cent. : the sum mentioned in the bond being the price of the property purchased, is due on a contract posterior to the original one between the parties, which was merged in the judgment on which the execution issued, and the stipulations of which cannot be further extended, and regulate the last contract of sale.

It is certainly clear, judgment was correctly rendered with the interest of ten per cent. till payment, according to the stipulation of the original contract. Even if that was wrongly ordered, the matter is now *res judicata*, and there is no appeal.

The act of the legislature requires, that on a sale on an execution, on a credit of twelve months, a bond should be given, bearing interest, *at the like rate as was payable by the judgment*, 1817, *p.* 134. The bond therefore pursues the law, and the case is not altered by the circumstance of the debtor in the execution, having purchased his own property, nor by the amount of the purchase exceeding the original capital, on which interest was stipulated for ; because the sum bidden ought, according to law, to bear interest, *at the like*

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rate as was made payable by the judgment, for the benefit of the creditor in the execution, and afterwards for that of the debtor, after the former is satisfied.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Simon for the plaintiff, *Brownson* for the defendant.

PERRY vs. *BELIEVRE.*

"P. P. of the kingdom of France," is a sufficient stating of the plaintiff's residence.

APPEAL from the court of the fifth district, and parish of St. Martin.

MARTIN, J. delivered the opinion of the court. The sole question presented to this court is, whether the residence of the plaintiff is legally stated in the petition. He describes himself as Peter L. Perry, of the kingdom of France, without naming any particular province, county, parish or town, or other division in that kingdom. This question was answered affirmatively in the district court, and from this decision there is an appeal.

We are unable to say, that the judge *a quo* erred. Persons residing in the state are ge-

nerally referred to, as residents of the parish or town they inhabit ; but foreigners are seldom known by any other description than the state they come from. The particular division into counties, provinces, townships, cities, arrondissements, &c. are not supposed to be known. No decision is referred to and we believe none exact on this point, but the practice is sufficiently notorious, and we think it is not incorrect.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiff, *Simon* for the defendant.

FOSTER vs. *MURPHY.*

APPEAL from the court of the fifth district.

A purchaser at a sheriff's sale, cannot withhold or recover the price, unless he be disturbed in his possession of the land.

MATTHEWS, J. delivered the opinion of the court. This suit was instituted in the court below for the purpose of recovering back money which the plaintiff alleges he had unadvisedly and illegally paid to the defendant, as sheriff of the parish of St. Mary, on a purchase of property, which was sold under

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execution by the latter without adequate authority derived thro' the regular forms of law.

The district court rendered judgment, by which the sale is declared null and void, and the price decreed to be refunded to the plaintiff. All the proceedings in the inferior court were carried on against the sheriff alone, up to final judgment. After said judgment the plaintiff in execution, for whose benefit the property had been sold, claimed a right to interfere in the suit, and joined the present defendant in a petition for an appeal, which was refused to him, the said plaintiff, although allowed to the defendant. The right of the former to appeal in the present action, was denied on the ground of his not being a party to the suit; and from the decree thus rendered against him, he has appealed.

We are inclined to think that the judge *a quo* erred in refusing an appeal to the plaintiff in execution, as he has a direct and very material interest in the event of the suit: but as the contest can be fully and fairly decided between the present plaintiff and the defendant, the latter of whom now stands in the situation of a stake holder between the two former, it is deemed unnecessary to solve abso-

lutely the question which arises in relation to the right of appeal.

As to the merits of the case, admitting to the full extent insisted on by the plaintiff, the formal defects of the writs and proceedings in execution, we are still of opinion that he could not legally avail himself of them, to refuse payment of the price which he bid for the property, and they are much less available for him to recover back such price after payment.

The present case, although differing somewhat in point of facts and circumstances, is not distinguishable as to principle, from several cases lately decided by this court; particularly the cases of *Abat* vs *Casteres*, and *Tabor* vs. *Johnston and al.* reported in 3 *Martin, n. s. p.* 220 and 674.

If indeed there be any difference, it is such as to make the case now under consideration, stronger against the plaintiff. The property was sold under execution on a twelve months bond, in which the present plaintiff was bound, as surety with the defendant in execution, who became the purchaser under the original execution, and who it seems never ceased to be proprietor until the sale on the bond. He alone

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could interfere to disturb the appellee in his right and possession, acquired in pursuance of the sale by the sheriff, which would certainly be a vain act on his part, as the property would immediately be subjected to seizure on the judgment, which would still remain in force against him. It is however settled by the cases cited that a purchaser by sheriff's sale cannot refuse to pay the price by him bid for the property, unless he be actually evicted from the same, by some legal process.

C. P. art. 710. C. C. art. 2586 contra

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and it is further ordered, that judgment be here entered for the defendant and appellant, with costs in both courts.

Baker for the plaintiff, *Lesassier & Bowen* for the defendant.

BROUSSARD vs. *HIS CREDITORS.*

After the proces-verbal of the meeting of the creditors of an insolvent is closed, the notary cannot, on a subsequent day, receive the votes of creditors who did not meet.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. In this case the plaintiff prayed for a *respite*, and a meeting of his creditors was ordered to take place on the 20th of December,

before the judge of the parish of St. Martins. On that day some of them attended, and voted for acceding to the prayer of the petitioner; the appellee appeared and opposed it, and the proceedings were closed, and returned into court.

But there not being a sufficient number of creditors at this meeting to produce the forced respite, several others appeared before the judge at a subsequent time and on different days. He received their declarations and returned them into court.

On the proceedings being called up in the district court for homologation, the appellee objected, that the votes given after the meeting was closed, could not be considered in the number of those which had granted the respite.

We think this objection well taken. The power of the notary, after he had closed the *process verbal* of what took place on the day appointed for the creditors to appear, expired. If they did not all attend on that day, he should have adjourned the proceedings, or a subsequent order from the court should have been obtained. The opposing creditors were deprived of the power of contesting

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the claims of those who appeared after the day fixed by the judge. It appears to us that such a practice as was pursued here would open the door to collusion and fraud, and that it should not be sanctioned by the court.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baker for the plaintiff, *Markham* for the defendants.

IRWIN vs. *ROBB.*

APPEAL from the court of the fifth district.

An appeal brought up, without a statement of facts, bill of exceptions, &c. so that the proceedings in the inferior court cannot be examined, is ever considered as a frivolous one.

PORTER, J. delivered the opinion of the court. The appellant having taken this appeal in a case where there is neither statement of facts, bill of exceptions, nor any other matter which will enable the court to revise the judgment of that of the first instance, the appellee has brought the cause up, and prayed that the decree given below may be affirmed with ten per cent. damages. It is the settled jurisprudence of this tribunal, that an appeal taken under such circumstances, can be considered in no other light but for the purposes of delay.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be confirmed with costs, and ten per centum damages on the amount of said judgment.

Todd for the plaintiff, *Lesassier & Brownson* for the defendant.

GRADNIGO vs. *P. & J. ROQUES.*

APPEAL from the court of the fifth district.

On an appeal from the dissolution of an injunction, allegederrors in the proceedings anterior to the original judgment, cannot be examined.

PORTER, J. delivered the opinion of the court. The appeal is taken from a decree dissolving an injunction, which had been obtained by the plaintiff, against the execution of a judgment which the defendants had obtained against him.

The judgment was rendered on a confession of the plaintiff, made in the clerk's office, by which he acknowledged the amount claimed of him to be due, and waived the right of appeal, on obtaining a stay of execution for a certain time therein mentioned.

But by a letter of the agent of defendants filed in the office of the clerk at the time this confession was given, it appears to have been made on the condition, that if the present plaintiff in injunction should before the period elapsed for issuing an execution, produce a receipt,

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shewing the payment of the note on which suit is brought, then the confession was to be null and of no effect.

This agreement gave rise to the application for an injunction. The plaintiff in his petition complains that the confession was obtained from him fraudulently; that he has since offered full and complete proof that the note was paid: and that notwithstanding this evidence, the defendants assert it is not satisfactory, and threaten to issue execution.

There is not a scintilla of proof that the confession was obtained fraudulently by the agent who acted for the defendants in obtaining judgment. The evidence in relation to the alleged payment to defendants is contradictory. The weight of it is rather with the appellees, and at all events, we are perfectly satisfied, it does not so preponderate in favor of the appellants, as to authorise us to depart from the well established rule of this court, not to reverse the judgment of that of the first instance on matters of fact when the evidence on each side appears of equal weight.

Several errors of law have been assigned in this court, as apparent on the record of the original suit. These errors, if errors they be,

cannot be examined in this case. They can only be gone into on an appeal taken from that judgment. The record of it, is introduced into these proceedings, as part of the evidence on which equitable relief is sought: it is not *directly* but *collateraly* before us.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Todd for the plaintiff, *Lesassier & Bowen* for the defendants.

PREVOST & WIFE vs. *GREIG & AL.*

APPEAL from the court of the fifth district.

The defendant in execution, who has enjoined several executions at the suit of different plaintiffs, in the hands of the sheriff, each for a sum less than $300, cannot give the supreme court jurisdiction of an appeal from a judgment dissolving the injunction.

PORTER, J. delivered the opinion of the court. This case originated by an application for an injunction against several creditors, who, in virtue of executions issued on distinct judgments, had seized property, which one of the plaintiffs, a married woman, alleges belongs to her. She avers, in the petition on which the writ of injunction issued, that the judgments rendered against

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her were illegal; that they were given on obligations entered into by her *in solido* with her husband; and that they were signed by her in consequence of his threats and solicitations.

On hearing the parties, the judge *a quo* dissolved the injunction, and the plaintiffs appealed.

It appears that each of these judgments was given for an amount less than that of which the court can take cognizance. The attempt, therefore, made by this mode of proceeding, to obtain a review of these judgments, and to have their nullity established, is an attempt to have that done, indirectly, which the law will not permit to be done directly. We are of opinion that we cannot, in this way, take cognizance of cases of which the constitution and the law have denied us jurisdiction.

It is therefore ordered, adjudged and decreed, that this appeal be dismissed with costs.

Simon for the plaintiff, *Brownson* & *Baker* for the defendants.